STATE OF MICHIGAN

COURT OF APPEALS

MARIE ABBOTT, Plaintiff-Appellant,	UNPUBLISHED April 8, 2003
V	No. 234846 Oakland Circuit Court
ESTATE OF RICHARD ABBOTT, Deceased, Defendant-Appellee.	LC No. 2000-025588-NO

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Plaintiff Marie Abbott appeals by right from an order granting summary disposition to defendant Richard Abbott's estate in this premises liability action. We reverse.

I. Facts and Proceedings

Plaintiff was married to Richard Abbott for approximately twelve years. The couple divorced in 1992, but remained friends and frequently talked on the telephone. During their marriage, the couple spent winters in Venice, Florida, and lived in their northern Michigan cabin during the summer months. When the couple made trips from Florida to northern Michigan, they usually stayed a night or two at their house in Bloomfield Hills. Other than these brief visits, however, the couple did not reside in the Bloomfield Hills home. After the Abbotts divorced, plaintiff lived in the Florida residence the couple had previously shared, and Richard Abbott lived in the Bloomfield Hills home. Plaintiff believed that after the divorce her name had been removed from the deed to that home. Nevertheless, she still stayed in the Bloomfield Hills home on her way to the cabin in northern Michigan.

Richard Abbott died on June 11, 1998. Approximately eleven days before his death, he called plaintiff and asked her to come stay with him in Michigan. He entered the hospital soon after he called plaintiff and stayed there until his death. Plaintiff flew to Michigan the day after Richard Abbott called her to be with him in his last days and lived in the Bloomfield Hills home until after he passed away.

On June 13, 1998, the day of Richard Abbott's funeral, plaintiff returned to the Bloomfield Hills home with her daughter and son-in-law after going to a restaurant. Her son-in-law pulled into the circular asphalt driveway in front of the home and stopped the car just past the beginning of the asphalt walkway leading to the front door. Plaintiff exited the passenger's

side of the vehicle, walked around the back of the car, and, as she neared the beginning of the walkway, tripped and fell on a depression created by a crack in the asphalt. The depression was close to the left edge of the asphalt and appeared to have been present for an extended period of time because it contained some type of sealant or tar that had been used in a prior attempt to repair it. Plaintiff testified that when she stepped down, her left ankle twisted and she fell on her left side. As a result of her fall, plaintiff sustained a fracture to her left wrist and left hip. Plaintiff admitted that at the time she fell, she did not know what precisely caused her to fall. She had used the same walkway earlier that day and was aware that the area was generally not well maintained, but during her stay prior to Richard Abbott's death she principally entered the home through the attached garage and did not use the walkway.

Plaintiff filed suit against defendant on August 25, 2001, claiming that defendant had failed to properly maintain the driveway. Defendant moved for summary disposition of plaintiff's claims pursuant to MCR 2.116(C)(8) and (10), asserting that the condition of the premises was open and obvious and that plaintiff did not see the defect because she was not watching where she was going. Defendant also claimed that because plaintiff was the personal representative of the estate and the sole devisee of Abbott's will, and since the powers of the personal representative and the devise in the will relate back to the date of the decedent's death, plaintiff had the requisite legal possession and control over the premises to be considered the defacto owner of the property when she fell, and that this status precludes her from bringing this action. Plaintiff argued in opposition to the motion that the crack in the asphalt was obscured by overgrown shrubbery lining the driveway and walkway, so the condition was not open and obvious. In ruling on defendant's motion, the trial court stated:

> I quite frankly think that the open and obvious aspect of this cuts it off. She was there. She knew, she should have known. There wasn't anything unique regarding this driveway. There wasn't any unreasonable risk. I mean there was an obvious problem, but there wasn't any unreasonable risk. She didn't know how to—there was a witness who said that nobody know [sic] how long the hole or the condition—what the condition of the driveway was before the incident and clearly, you've got to at the minimum pay some attention to what you're doing when you're going to do it. I don't think there's unusual—I don't think there's any unusual circumstance here that would justify denying the motion. So the motion is granted.

The trial court did not address defendant's second argument. Plaintiff appeals the trial court's ruling that the defect was open and obvious.

II. Standard of Review

The trial court did not state on which basis it granted summary disposition. However, because the court considered evidence other than the pleadings in making its decision, we find that summary disposition was granted pursuant to MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

We review de novo a trial court's grant or denial of summary disposition pursuant to MCR 2.116(C)(10). *Joyce v Rubin*, 249 Mich App 231, 234; 642 NW2d 360 (2002). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claim, and the court

considers the affidavits, pleadings, depositions, admissions, and other evidence in a light most favorable to the non-moving party. *Id.*; MCR 2.116(G)(5).

III. Analysis

Plaintiff argues that the trial court erroneously decided that the open and obvious doctrine precludes her recovery. We agree.

Plaintiff claims that she was a social guest at defendant's residence, and, therefore, she was a licensee. *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596; 614 NW2d 88 (2000), citing *Preston v Sleziak*, 383 Mich 442, 451; 175 NW2d 759 (1970). Defendant maintains that plaintiff was the owner of the property at the time of the occurrence, but argues that even if plaintiff was a licensee, the open and obvious doctrine bars its liability for plaintiff's injuries.

The open and obvious doctrine attacks the duty element of a negligence claim. *Riddle v McLouth Steel Products*, 440 Mich 85, 95-96; 485 NW2d 676 (1992). The existence of a legal duty is a question of law for the court to decide. *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). The duty owed to a plaintiff by the possessor of land in a premises liability action depends on the plaintiff's status when she is injured. *Stitt, supra* at 596. If plaintiff was in fact a licensee, defendant owed her a duty to warn her of any hidden dangers it knew or had reason to know of, if plaintiff did not know or have reason to know of the dangers involved. *Stitt, supra* at 596. Plaintiff's primary claim in this case, however, is that defendant breached a duty to maintain the premises. No such duty is owed by a possessor of land to a licensee. *Id.*, *Burnett, supra* at 373 ("A landowner does not owe his licensees any duty to inspect or to repair his premises.").[1]

A licensor's duty to warn does not extend to open and obvious dangers. *Pippin v Atallah*, 245 Mich App 136, 143; 626 NW2d 911 (2001). To determine whether a danger is open and obvious, the court examines "whether an average user with ordinary intelligence [would] have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp*, 198 Mich App 470, 475; 499 NW2d 379 (1993). "Because the test is objective, this Court 'look[s] not to whether plaintiff should have known that the [condition] was hazardous, but to whether a reasonable person in his position would foresee the danger.'" *Joyce*,

[1] In *Burnett*, this Court resolved an apparent conflict between 2 Restatement Torts, 2d, § 342, p. 210, which states that a possessor of land is subject to liability if he did not exercise reasonable care to make the condition safe, adopted by the Court in *Preston*, and another portion of the *Preston* holding that relies on § 330, comment *h* of the Restatement for the principle that a "guest is expected to take the premises as the possessor himself uses them, and does not expect and is not entitled to expect that they will be prepared for his reception, or that precautions will be taken for his safety . . . ." *Burnett, supra* at 370-371. The *Burnett* Court examined the commentary on § 342 and concluded that "the Restatement was neither intended nor designed to imply a duty owed by a landowner to his licensees to repair or to inspect his property." *Id.* at 371-372. Additionally, the *Burnett* Court stated that its conclusion was in line with the Michigan Supreme Court's analysis in *Stitt*. *Id.* at 372-373.

supra at 238-239, quoting *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997).

In the present case, the trial court held that plaintiff knew or should have known of the danger presented. In reaching this conclusion, it appears that the trial court relied to some extent on plaintiff's admission that, at the time she fell, she was not watching where she was walking. Because the open and obvious doctrine is based on an objective consideration of the condition of the premises rather than the plaintiff's conduct, the trial court's reliance on this factor was misplaced. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523; 629 NW2d 384 (2001). Plaintiff's responsibility, if any, for her fall is relevant to a comparative negligence analysis but does not automatically preclude her recovery. *Id.* Looking at this issue from the proper perspective and viewing the evidence in a light most favorable to plaintiff, we conclude that a genuine issue of material fact exists concerning whether the defect was open and obvious and, therefore, whether defendant owed plaintiff a duty of care.

The evidence presented to the trial court in this case showed that due to a lack of maintenance, the branches on the shrubs adjacent to the intersection of the driveway and walkway were overgrown by approximately two to three feet in every direction. In fact, at the time of plaintiff's fall, the shrubs covered all but approximately two to three feet of the walkway itself, making it particularly difficult to avoid the branches when walking to and from the driveway. Additionally, plaintiff's son-in-law, who observed the fall, testified that the bushes were close to the area where plaintiff fell at the intersection of the driveway and the walkway. Also, he had walked from the asphalt walkway to the house earlier in the day, but did not see the depression in the asphalt. Plaintiff had also used the walkway earlier in the day without incident. This evidence demonstrates a genuine issue of material fact regarding whether the condition was open and obvious.

Additionally, we find that the fact that plaintiff routinely entered the house through the attached garage rather than taking the walkway to the front door raises a question of fact concerning whether she had reason to know of the danger. *Stitt, supra*. Similarly, the evidence that a tar-like substance was used to patch the depression raises a question of fact concerning whether defendant knew or had reason to know of the defect. *Id.* We therefore reverse the trial court's decision concerning the application of the open and obvious doctrine.

As stated above, defendant also argues that it is not liable because plaintiff was in possession and control of the property at the time of her injury. The trial court did not decide this issue. Rather than deciding this issue for the first time on appeal, we remand this case to the trial court for consideration of whether plaintiff had possession and control of the premises.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper